STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

ANDREW MAURICE RANDOLPH **No. 153309**
Defendant-Appellant.

L.C. No. 13-033003-FC
COA No. 321551

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

MARK REENE
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief, Research, Training, and Appeals

TIMOTHY A. BAUGHMAN (P 24381)
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226
Phone: (313) 224-5792

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Statement of the Question

I.

The prejudice component for both plain error and ineffective assistance requires a showing of the probability of a different result, which is a probability sufficient to undermine confidence in the outcome of the proceeding. Are the standards the same, so that if prejudice is not found on review for plain error, the matter is closed, rather than a second ineffective assistance prejudice inquiry undertaken?

Amicus answers: "YES"

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

The prejudice component for both plain error and ineffective assistance requires a showing of the probability of a different result, which is a probability sufficient to undermine confidence in the outcome of the proceeding. The standards are the same, so that if prejudice is not found on review for plain error, the matter is closed, rather than a second ineffective assistance prejudice inquiry undertaken.

Introduction

Some of defendant's evidentiary claims[1] on appeal were unpreserved by proper objection in the trial court.[2] The Court of Appeals said that the unpreserved claims were reviewed for plain

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[1] Unpreserved was certain testimony claimed to be hearsay, the admission of ammunition and of the murder weapon, claimed on appeal to have been discovered in improper searches, and testimony concerning a gunshot residue test, not objected to at trial on grounds raised on appeal that the testimony was inadmissible under MRE 701 and MRE 702.

[2] See MRE 103(a):

> **(a) Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

error,[3] which it did not find with regard to any of defendant's claims. In his application for leave, defendant argues that this case concerns "an important recurring legal error" on the part of the Court of Appeals, in that "[d]ue to the ineffectiveness of Mr. Randolph's trial attorney, many of the [alleged] errors were unpreserved," but the Court of Appeals in resolving the claims "conflated" the plain error and ineffective assistance arguments, "repeatedly stating that Mr. Randolph could not demonstrate ineffective assistance of trial counsel simply because he could not show plain error."[4] In particular, defendant argues that leave should be granted because the Court of Appeals "appears regularly to conflate the prejudice inquiries in the plain error and *Strickland* standards," while, according defendant, this Court has held that the "plain error prejudice standard is higher than the *Strickland* prejudice standard."

This Court has, on defendant's application, directed that supplemental briefs be filed addressing:

- whether a defendant's failure to demonstrate plain error precludes a finding of ineffective assistance of trial counsel; and, in particular,
- whether the prejudice standard under the third prong of plain error, *People v Carines*, 460 Mich 750, 763-764 (1999)

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[3] *People v. Randolph*, No. 321551, 2015 WL 7574328, at 2 (2015). And see MRE 103(d): "**Plain Error**. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

[4] Defendant's application, p. xi-xii. The Court of Appeals with regard to unpreserved hearsay claims said, with regard to the claim that defense counsel was ineffective for failing to object, "defendant has failed to establish plain error in the admission of alleged hearsay statements regarding the threats he made and thus his claim of ineffective assistance of counsel must fail. . . . Similarly, defendant has failed to establish plain error in the admission of the evidence regarding the ammunition, defendant's arrest on the federal warrant, and the guns, and thus his related ineffective assistance of counsel claims must also fail." *People v. Randolph*, 2015 WL 7574328 at 9.

("affecting substantial rights"), is the same as the *Strickland* prejudice standard, *Strickland v Washington*, 466 US 668, 694 (1984) ("reasonable probability" of a different outcome). See *United States v Dominguez Benitez*, 542 US 74, 83 (2004); *People v Fackelman*, 489 Mich 515, 537 n 16 (2011); *People v Kowalski*, 489 Mich 488, 510 n 38 (2011).

Amicus answers that ineffective assistance of counsel and plain error are inquiries that are directed to different situations, but their prejudice components are the same.

A. The synergy of ineffective assistance analysis and review for plain error

> "*It would be nonsensical if a [defendant] could subject his challenge of an unobjected-to error to a lesser burden by articulating it as a claim of ineffective assistance."*[5]

Michigan reviews unpreserved claims of error for plain error.[6] Claims of issue waiver—which is distinct from issue forfeiture[7]—and claims regard counsel's performance under the ineffective assistance standard are, amicus submits, but different ways of labeling essentially the same inquiry, made under different circumstances. So understood, a synergy results, rendering coherent review of trial defense counsel's actions or inactions. With regard to issue forfeiture, the

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[5] *Gordon v. United States*, 518 F.3d 1291, 1298 (CA 11, 2008). Amicus has omitted "on collateral review" from this quotation, which does not change its thrust. As used here "on collateral review" is descriptive not restrictive, as, unlike Michigan, the federal system does not have a unitary system of appeal, and ordinarily claims of ineffective assistance must be brought on collateral review. See e.g. *United States v. Galloway*, 56 F.3d 1239, 1240 (CA 10, 1995) (en banc) ("Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed").

[6] *People v. Carines*, 460 Mich. 750 (1999).

[7] *Id*., at 763: "'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right' " (quoting *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993).

doctrines of ineffective assistance analysis and plain error review coalesce; otherwise, dual inquiries may needlessly be undertaken routinely. First, it may be asked whether the absence of objection resulted in plain error, and then, if analysis shows not, the inquiry may proceed to whether the scenario involved constitutes ineffective assistance.[8] This is largely what defendant seeks when he says that counsel's failures to object to evidence admitted at trial constitute ineffective assistance even if they are not plain error. But on completion of the first inquiry, that as to plain error, the matter should be considered closed; either plain error has occurred resulting in reversal, or it has not. As the 11th Circuit has pointed out, "It would be nonsensical if a [defendant] could subject his challenge of an unobjected-to error to a lesser burden by articulating it as a claim of ineffective assistance." If, as defendant seems to suggest, all issue forfeitures by counsel should be reviewed for plain error, and then, if reversible error does not appear, for ineffective assistance of counsel for the act of issue forfeiture by failing to object, and on a lesser standard of prejudice, then the plain error inquiry *is* truly nonsensical. It would be as though the bar exam had two standards of performance—a score of 135 for passage, but if one failed that, a score of 125 would pass. This simply means the actual performance test is 125; the lesser standard *is* the standard, and the greater standard is meaningless.

But the doctrines of plain error and ineffective assistance are complementary, rather than ineffective assistance being supplementary to plain error. Plain error examines the forfeiture of issues issue by way of failure to object to such things as particular evidence (or to raise the

[8] Amicus sees many cases where counsel first makes an argument of plain error, and then moves to ineffective assistance of counsel as a second rationale to be considered if the appellate court finds the argument of plain error unavailing. Or often a number of forfeited issues are raised as plain error, with a catch-all final issue alleging that even if plain error has not been shown, counsel was ineffective for not objecting properly.

appropriate objection to it), or to object to or request an instruction to the jury, or to object to remarks in the prosecutor's argument—in short, of-record claims. Ineffective assistance analysis looks to such matters as the failure of counsel to present certain evidence, or to call available witnesses, such as alibi witnesses, or to engage in certain investigation, or to prepare for trial properly—in short, not-of-record claims.[9] A synergy thus results. The "elements" of the doctrines reveal this synergy.

1. The elements of review for plain error

The elements of a plain-error claim, to all of which the party forfeiting the claim bears the burden of persuasion, are:

- that error occurred, to which no proper objection was made;
- that this error was plain or obvious; that is, it was so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object.[10] "The plain error doctrine concentrates on "blockbusters," to the exclusion of "the ordinary backfires . . . which may mar a trial record.". . . Under it, appellate courts will notice unpreserved errors "only in the most egregious circumstances."[11] At least as a general rule, then, it must

[9] Also, issue *waiver* can raise a claim of ineffective assistance. If defense counsel, for example, presented a reasonable doubt instruction allowing conviction on a preponderance of the evidence, that counsel procured the error constitutes a waiver, rather than a forfeiture, of any claim—but that act would constitute ineffective assistance of counsel.

[10] See e.g. *United States v. Brown,* 352 F.3d 654, 665 n. 10 (CA 2, 2003) ("Error is plain if it is 'so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object'"); *United States v. Gore,* 154 F.3d 34, 42-43 (CA 2, 1998); *United States v Whab*, 355 F.3d 155, 158 (CA 2, 2004);

[11] *United States v. Taylor*, 54 F.3d 967, 972–973 (CA 1, 1995). See also *United States v. Conley*, 291 F.3d 464, 470 (CA 7, 2002) ("It is well-established that the plain error standard allows appellate courts to correct only particularly egregious errors for the purpose of preventing a miscarriage of justice").

be said that defense counsel in such a circumstance was not functioning as the counsel guaranteed by the Sixth Amendment.[12]

- that the error affected "substantial rights" of the defendant, which where error is preserved means that the prosecution cannot demonstrate that the error did have "substantial influence" on the factfinder,[13] so that with unpreserved error the burden is on the defendant to show that it did;[14]

- that the error affected substantial rights to the degree that it seriously created a substantial risk of convicting an innocent person, or affects the fairness, integrity, or public reputation of judicial proceedings.[15] This prejudice standard is met when it is shown that the error is *"sufficient to undermine confidence in the reliability of the outcome*" of the trial.[16]

2. The elements of review for ineffective assistance

Compare review for plain error with the elements of the ineffective assistance inquiry, where the defendant must show that:

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[12] *Charles v. Stephens*, 736 F.3d 380, 389 (CA 5, 2013) ("Ultimately, the defendant must show that the errors were so egregious as to deprive the defendant of the 'counsel' guaranteed by the Sixth Amendment").

[13] See *Kotteakos v United States*, 328 US 750, 90 L Ed 1557, 66 S Ct 1239 (1946).

[14] In Michigan, however, given MCL 769.26, which does not differentiate between preserved and forfeited error, the defendant maintains the burden of showing prejudice more likely than not occurred from the error even even where the error was preserved by proper objection. *People v Lukity*, 460 Mich 484 (1999).

[15] See e.g. *Johnson v. United States,* 520 U.S. 461, 466-467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

[16] "Put another way, the "defendant must . . . satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *United States. v. Turbides-Leonardo,* 468 F.3d 34, 39 -40 (CA 1, 2006). See also *United States. v. Dominguez Benitez*, 542 US 74, 124 S Ct 2333, 159 L.Ed.2d 157 (2004); *United States v. Wright*, 848 F.3d 1274, 1278 (CA 10, 2017), and many others, some discussed infra. The cases use the same "undermine confidence in the outcome" definition as is used in the ineffective assistance inquiry into prejudice.

- Counsel erred;
- that the error(s) were so egregious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment;
- that the error(s) prejudiced the defendant; and
- to the degree that the result of the trial is not reliable: "[t]o succeed on a Sixth Amendment claim of ineffective assistance of counsel, defendant must show that there is a reasonable probability,' which is *a probability sufficient to undermine confidence in the outcome,* that, but for counsel's unprofessional errors, result of the proceeding would have been different."[17]

B. The prejudice components of plain error and ineffective assistance are indistinguishable

1. Precedent from the United States Supreme Court and from this Court establish that the prejudice components are the same

This Court has focused the attention of the parties on the prejudice component of the plain error and ineffective assistance inquiries, asking whether the prejudice standard of the test for plain error is the same as the prejudice standard for ineffective assistance, so that a defendant's failure to demonstrate plain error precludes a finding of ineffective assistance of trial counsel. Precedent from both the United States Supreme Court and this Court demonstrate that this is so. In *United States v. Dominquez Benitez*[18] the defendant pled guilty under a plea agreement with a sentencing recommendation from the prosecution; at the plea, the trial judge failed to inform him, as required by Fed. Rule Crim. Proc. 11(c)(3)(B), that if the court did not follow the recommendation defendant

[17] *Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984).

[18] *United States v. Dominquez Benitez*, 542 U.S.74, 124 S.Ct. 2333, 158 L.Ed.2d 157 (2004).

could not withdraw his plea.[19] There had been no objection, and review for this failure was thus for plain error, requiring that the error, if found to be plain or obvious, must have affected the defendant's substantial rights. The Court observed that the purpose of review for plain error is "to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error."[20] With regard to the required demonstration of prejudice, then, the Court held that "a defendant who seeks reversal of his conviction . . . on the ground that the district court committed plain error . . . must show a reasonable probability that, but for the error, he would not have entered the plea. A *defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is "sufficient to undermine confidence in the outcome" of the proceeding*, *Strickland*, supra, at 694. . . ."[21] The Court thus cited the very test for prejudice for ineffective assistance from *Strickland*, the cited reference saying that to demonstrate prejudice to show ineffective assistance of counsel "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[22] It is incontrovertible that the United States Supreme Court has treated the treated the prejudice standards for plain error and ineffective assistance as identical; it has defined the one in terms of the other!

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[19] Unlike the so-called "*Cobbs*" plea process in Michigan.

[20] *United States v. Dominguez Benitez*, 124 S. Ct. at 2340.

[21] *Id*. (emphasis supplied).

[22] *Strickland v. Washington*, 104 S. Ct. at 2068.

This Court has spoken similarly. In *People v. Kowalski*[23] the Court found that defendant had established instructional error that was plain or obvious. Though finding the error waived, the Court also held that defendant could not prevail under review for forfeited plain error because he could not establish the requisite prejudice; that is, that the error affected his "substantial rights." If viewed as a claim of ineffective assistance of counsel for issue-waiver rather than issue forfeiture, then, said the Court, "[f]or the same reasons that we conclude that defendant failed to show outcome-determinative prejudice under the plain-error standard discussed earlier in this opinion, we also conclude that defendant failed to show that there was a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."[24] As the United States Supreme Court made clear in *Dominquez Benitez*, "outcome-determinative prejudice" under plain error is a showing of a reasonable probability that, but for the error, the outcome of the proceeding would have been different; that is, a showing of a probability "sufficient to undermine confidence in the outcome of the proceeding," precisely the prejudice standard for ineffective assistance under *Strickland*.[25]

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[23] *People v. Kowalski*, 489 Mich. 488 (2011).

[24] *Id*., at 510.

[25] The Court in *People v. Fackelman*, 489 Mich. 515, 537 (2011) found unobjected to error to be plain error affecting the defendant's substantial rights ("we review these constitutional and evidentiary errors for plain error affecting defendant's substantial rights. . . . We conclude that defendant is entitled to relief under this standard"). In a footnote to this sentence, the Court said that "We believe that defendant is entitled to relief under either the plain error standard articulated in *Carines*, or the ineffective assistance of counsel standard set forth in *Strickland* . . . We proceed under the former only because it requires the higher showing, which, in our judgment, defendant has made." *Id*., at 538. It is unclear whether by a "higher showing" the Court meant that showing that an error is plain or obvious is more difficult than showing that counsel was not "performing as the counsel for the accused," or that the prejudice standard of plain error is more difficult to meet than that of ineffective assistance of counsel. If the Court's

2. Case law from the federal circuits and state courts establish that the prejudice components are the same

Again, *Strickland* defines the prejudice showing required for ineffective of counsel as a showing by the defendant of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." The prejudice component for plain error is regularly defined by the federal circuits in this fashion. For example, the 10th circuit has said that "To satisfy the third prong of plain-error review, a defendant generally must demonstrate that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different. . . . a reasonable probability is a probability sufficient to undermine confidence in the outcome."[26] The 9th circuit rejected has rejected a plain error claim, saying that to establish prejudice defendant was required to establish, on the totality of circumstances, "the probability of a different result . . . 'sufficient to undermine confidence in the outcome' of the proceeding."[27] The 6th circuit has held that "To satisfy the plain-error standard of review, the error must affect . . . substantial rights. . . . we must determine, based on the entire record, "that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.'"[28] In upholding a

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remark is taken to mean the latter, it is inconsistent with *Dominguez Benitez*, and dicta in any event; the opinion never discusses what a showing that the error "affected substantial rights" means. And, as amicus argues, if forfeited error is reviewed for *both* plain error and ineffective assistance, and the prejudice component of the latter is less difficult to meet than the former, then the existence of the plain error standard of review is, as the 11th circuit has said, nonsensical.

[26] *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1138 (CA10, 2017) (citing *Dominguez Benitez*).

[27] *United States v. Myers*, 804 F.3d 1246, 1257 (CA 9, 2015).

[28] *United States v. Ushery*, 785 F.3d 210, 221 (CA 6, 2015).

conviction, the Fourth Circuit recently said that "although the district court's interferences in this case went beyond the pale, in light of the plain error standard of review and the overwhelming evidence against Appellant, the district court's conduct did not create such an impartial and unfair environment as to affect Appellant's substantial rights and undermine confidence in the convictions."[29] The point is made, amicus believes; examples abound throughout the federal circuit decisions. State decisions make the same point.[30]

A number of cases directly discuss the question of whether the prejudice standards for plain error and ineffective assistance are indistinguishable. Amicus believes that point established by *Dominquez Benitez* and the multitude of cases defining prejudice under plain error in identical terms to that of ineffective assistance, requiring a reasonable probability of a different outcome, which is a probability sufficient to undermine confidence in the outcome of the proceeding. Several examples make the point.

- It is true that the "substantial rights" standard of plain error review is identical to the "prejudice" standard of an ineffective assistance claim.[31]

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[29] *United States v. Martinovich*, 810 F.3d 232 (CA 4, 2016).

[30] See e.g. *State v. Decoteau*, 940 A.2d 661, 673 (Vt, 2007) (" 'we must examine the record in each case, and determine whether the error is so prejudicial that 'it undermines confidence in the outcome of the trial' "); *Martin v. State*, 779 S.E.2d 342, 359–360 (Ga, 2015) (the "test for harm under plain error review is equivalent to the test in ineffective assistance of counsel cases for whether an attorney's deficient performance has resulted in prejudice of constitutional proportions. . . . That test requires a showing of 'a reasonable probability that ... the result of the proceeding would have been different,' which is 'a probability sufficient to undermine confidence in the outcome' "). And see cases cited infra.

[31] *Gordon v. United States*, 518 F.3d 1291, 1300 CA 11, 2008).

- [T]he standard for prejudice under *Strickland* is virtually identical to the showing required to establish that a defendant's substantial rights were affected under plain error analysis.[32]

- [W]e have suggested that the standard for plain error review and ineffective-assistance-of-counsel are comparable, and in some respects, plain error review may be less demanding.[33]

- The trial court's error must have affected the outcome of the trial. . . . The accused is therefore required to demonstrate a reasonable probability that the error resulted in prejudice—the same deferential standard for reviewing ineffective assistance of counsel claims.[34]

- Because we have already concluded there is no prejudice under plain error, we also conclude there is no prejudice for purposes of ineffective assistance of counsel. . . . 'Because both the plain error and ineffective assistance of counsel tests require a showing of prejudice, it is redundant to address this claim under plain error.'[35]

- We have held that the prejudice test is the same whether under the claim of ineffective assistance or plain error.[36]

Several jurisdictions have reached a contrary result, but these appear to be based on state law. For example, in *Hagos v People*[37] the court held that the standards of prejudice for plain error and ineffective assistance differed because it had previously defined plain error as prejudicial only where the error "so undermined the fundamental fairness of the trial itself as to cast serious doubt on the

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[32] *Close v. United States*, 679 F.3d 714, 720 (2012).

[33] *United States v. Remsza,* 77 F.3d 1039, 1044 (CA 7, 1996) (noting that prejudice prongs of both tests are nearly identical). See also *United States v. Rangel*, 781 F.3d 736, 745 (CA 4, 2015).

[34] *State v. Rogers*, 38 N.E.3d 860, 866 (Oh, 2015), citing *Dominguez Benitez*.

[35] *Reed v. State*, 793 N.W.2d 725, 735–736 (Mn, 2010).

[36] *State v. McNeil*, 365 P.3d 699, 704 (Ut, 2016).

[37] *Hagos v. People*, 288 P.3d 116 (Co., 2012).

reliability of conviction," which the court viewed as a test requiring impairment of the reliability of the outcome to a *greater* degree than required by *Strickland* for a finding of ineffective assistance of counsel: "Plain error cases serious doubt on the judgment of conviction. Deficient performance of counsel, on the other hand, undermines confidence in the judgment of conviction. The words 'undermine confidence' reveal that the error in a claim of ineffective assistance of counsel must impair the reliability of the judgment of conviction to a lesser degree than a plain error in order to warrant reversal of the conviction."[38] But there is no reason for this Court to define prejudice for plain error in this rather peculiar way. In light of the myriad of federal and state cases that define prejudice for plain error as a probability of a different outcome, that probability being one sufficient to undermine confidence in the outcome of the proceeding, the *same* standard as laid out in *Strickland*, and employed by the United States Supreme Court in *Dominguez Benitez* for plain error, citing *Strickland*, this Court should follow suit. This is so because applying one standard of prejudice to an error, and then applying another lesser standard, is absurd, essentially abolishing the first standard, or rendering it busywork to be undertaken by the appellate court. It is, as the 11th circuit cogently put it, "nonsensical if a [defendant can] subject his challenge of an unobjected-to error to a lesser burden by articulating it as a claim of ineffective assistance."

C. Conclusion

This Court should not subject claims of forfeited error to two tests of prejudice, but only one, the same as employed for ineffective assistance, as shown by *Dominguez Benitez*, applying ineffective assistance to not-of-record claims, or claims where the error was waived rather than forfeited, so that the two doctrines work together. However denominated, the prejudice showing

[38] *Id*., at 120-121.

should be the same. If a forfeited claim of error is subjected to review for plain error, and prejudice not found, the matter should be over, rather than the inquiry being viewed as an academic exercise before moving on to a less-demanding standard of ineffective assistance. A rational system must treat the prejudice standards the same.

Relief

Wherefore, amicus requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

MARK REENE
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief, Research, Training, and Appeals

/S/
TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226